LEE KIM LUANG

v.

LEE SHIAH YEE

HIGH COURT MALAYA, TEMERLOH
KC VOHRAH J
[CIVIL SUIT NO. 13 OF 1985]
1 JUNE 1987

LAND LAW: *Transfer of land - Name of transferee was in issue - Allegation of fraud - Burden of proving fraud - Whether land could be transferred to minor - Whether inscription on tombstone admissible as evidence - Whether handwriting was that of deceased person.*

The plaintiff brought an action against the defendant as administrator of his father's estate. The plaintiff contended that certain land which formed part of the estate did not belong to the defendant's father as the transferor had transferred the land to the plaintiff's father. The transferor was the wife of the plaintiff's father and the mother of the defendant's father. The transferor had named the transferee as one "Lee Yeak" and that was not the full name of either the plaintiff's father or the defendant's father. The land was transferred in 1924. The plaintiff's father died in 1931 and the transferor and the defendant's father were the administrators of that estate. The land which was the subject-matter of the dispute was not listed as part of the estate of the plaintiff's father. The defendant's father died in 1951. The plaintiff filed the suit in 1979. The issues were whether the name "Lee Yeak" referred to plaintiff's father or to the defendant's father; whether there was fraud; whether the inscription on the plaintiff's father's tombstone was admissible; whether a statutory declaration by the transferor on her husband's name was admissible, whether the said land could be transferred to the defendant's father who was a minor at the material time; and whether certain handwriting was that of the defendant's father or plaintiff's father.

Held:

[1] The inscription on the tombstone of the plaintiff's father was admissible under s. 32(f), Evidence Act 1950 as it was statement of a relevant fact relating to the existence of a relationship of two deceased persons namely the plaintiff's father and the defendant's father. The plaintiff's father was also the father of the defendant's father. The weight to be given to that inscription was slight as the defendant only saw the tombstone in 1980.

[2] The statement by the transferor on the name used by the plaintiff's father was not admissible under s. 32(e) Evidence Act 1950 as it was made after the question in dispute.

[3] The evidence of the handwriting of the plaintiff's father and defendant's father which were in Chinese characters were not admissible as neither a handwriting expert was called as a witness nor could the Court make a comparison with evidence of their handwriting which had been admitted.

[4] The age of majority at the material time of the transfer was 21 years. There was no statutory provision in force at that time. There was no provision in the FMS Land Enactment which was in force at that time which provided that the transferee should be described as being of full age.

[5] There was a lack of particulars of the allegation of fraud in the statement of claim. The burden of proving fraud was higher than in the ordinary civil case and the plaintiff had not proved that.

[6] One material fact was that the transferor was the administrator of the estate of the plaintiff's father and the land in dispute was not included as part of the estate. After considering the other facts, it was held that the plaintiff had not proved the said land belonged to his father.

[Plaintiff's claim dismissed with costs.]

Cases referred to:
Chuah Hooi Gnoh Neoh v. Khaw Sim Bee [1915] AIR PC
Yap Tham Thai v. Low Hup Neo 1 FMSLR 383 402
Wallinford v. Mutual Society [1880] 5 App Cas
Netherlands Trading Society v. Koh Kim Guan [1959] MLJ 173

Legislation referred to:
Evidence Act 1950, ss. 32(f), (e), 45, 47, 49, 73(1)
Rules of the High Court 1980, O. 18 r. 12

For the plaintiff - P.H. Yeo; M/s. Shook Lin & Bok
For the defendant - Edmund Yeong; M/s. S.M. Yeong & Co.

JUDGMENT

KC Vohrah J:

This suit was filed in the High Court in Kuala Lumpur in 1979 and on the application of the plaintiff was transferred to the Temerloh High Court where it was registered in 1985.

Slightly more than 6 decades ago, in 1924, two plots of land, now amalgamated into one, were transferred to one "Lee Yeak." The transferor in both cases was Goh Ching. One of the main questions now is whether she transferred both the lots to her husband, Lee Chan, or to their son, Lee Teow Kee.

Goh Ching is now dead. And so too are her husband Lee Chan and their son Lee Teow Kee. The plaintiff asserts that Lee Chan was known as "Lee Yeak" or "Lee Aik" and that the amalgamated property was therefore Lee Chan's. The defendant disputes that and says that Lee Teow Kee, his father, was known as "Lee Yeak" or "Lee Aik".

Lee Chan died intestate in 1931. When letters of administration in respect of this estate were granted to his widow Goh Ching and their son Lee Teow Kee, this amalgamated property, EMR 1315. Lot 1522 in the Mukim of Mentakab, District of Temerloh, did not appear in the list as one of the assets of Lee Chan's estate.

In respect of this the plaintiff pleads in para. 5 of this statement of claim.

> For reasons unknown to the plaintiff, the said land was not included in the list of assets of the estate of the said Lee Chan, deceased.

It will be noted that no fraud was pleaded in relation to the administrators, Goh Ching or Lee Teow Kee. And in this context it is to be remembered that Goh Ching who co-administered the estate of Lee Chan was the person who transferred the disputed land in 1924.

In 1952 Lee Teow Kee died. And this land, EMR 1315 Lot 1522, was instead included as an asset of his estate.

The plaintiff, one of the sons of Lee Chan, asserts that the said property was Lee Chan's. While he does not allege fraud on the part of Lee Teow Kee he alleges fraud on the part of the defendant, one of the sons of Lee Teow Kee and sues him in his capacity as administrator of the estate of Lee Teow Kee.

The petition for Grant of Letters of Administration in respect of Lee Teow Kee's estate was made in 27 April 1953. The plaintiff however filed this suit some 26½ years later on 27 October 1979 in the Kuala Lumpur High Court and alleges in para. 11 of his statement of claim that he was away from the country from 1949 when he left for China for further education until he was permitted to enter Malaysia (in 1979) for the purpose of the suit. He pleads that he was ignorant of the alleged wrongful act of the defendant.

He seeks a declaration that the said land forms part of the estate of his father Lee Chan and he wants, *inter alia*, an account of all the moneys received by the defendant or by any person on behalf of the estate of the defendant's father in respect of the land.

The defendant denies the allegation of fraud. He states that his father Lee Teow Kee was known as "Lee Yeak" and "Lee Aik" and the said property was his father's and that it was properly included in the list of the assets of his estate. The defendant pleads in the alternative that the plaintiff's cause of action is time barred by virtue of the Limitation Act 1953.

Identity

I shall deal with the allegation of fraud later. For the moment there is need to deal with the main factual issue in this case, whether the name "Lee Yeak" as appears in the 2 memoranda of transfer executed (shown at PBD 20 and 22 respectively) is the alias of Lee Chan or of Lee Teow Kee.

The plaintiff was a child of 6 years old when his father, Lee Chan, died. He had to rely, *inter alia*, on the evidence of PW2, Lim Thian Soon, the son-in-law of Lee Chan that Lee Chan was also known as "Lee Aik". PW2 however said that he had heard from his mother-in-law, Goh Ching, that his father-in-law had that alias. PW2 admitted that at the time of his marriage his father-in-law had already passed away. And Goh Ching his mother-in-law naturally was not available as a witness as she had passed away, according to the plaintiff, on 9 November 1973. The evidence therefore of PW2 that Lee Chan was also known as "Lee Aik" is hearsay and accordingly I disregard the evidence. The plaintiff next relied on the inscription of his father's tombstone in Chinese characters which read "Lee Jit Chan alias Lee Chin Aik". It has to be pointed out that Counsel for the defendant withdrew an allegation that he had made earlier, and before physical inspection of the said tombstone, that the tombstone was erected in 1979 and I take it that he is not disputing that the tombstone was erected before the question in dispute was raised and before litigation was commenced on the dispute. Although the tombstone was erected *ante litem motam* the question still arises whether the inscription relating to the alias of Lee Chan on the tombstone is admissible.

The inscription (translated from Chinese characters) reads -

Name of deceased father: Lee Jit Chan alias Lee Chin Aik (Yeak).

Date of Death: Year 1931
Sons: (1) Teow Kee
(2) Kim Leng
(3) Kim Luan
(4) Kim Toon.

The question is whether the statement relating to the alias is a statement of a relevant fact relating to "the existence of any relationship by blood, marriage or adoption between deceased persons" within the meaning of s. 32(f) of the Evidence Act 1950. To my mind the inscription does show the father-son relationship of two deceased persons and a relevant fact is that the father whose name was Lee Jit Chan was also known as "Lee Chin Aik." I therefore hold that the inscription on the tombstone relating to the alias is admissible.

But it only shows that Lee Chan had an alias of "Lee Chin Aik" not "Lee Aik".

The plaintiff also relied on a statutory declaration made by Goh Ching, his mother, where Goh Ching swore that the name of her husband was Lee Aik alias Lee Chan and where she listed the names of her 3 children including the name of her adopted son Lee Teow Kee. Even if it is considered that the statutory declaration of Goh Ching may be relevant in the context of para. (e) of s. 32, nevertheless the statement was made after the question in dispute, whether Lee Chan or Lee Teow Kee was known as Lee Aik, was raised, quite unlike the situation in *Chuah Hooi Gnoh Neoh v. Khaw Sim Bee* [1915] AIR PC where an affidavit made before the issue arose was held to be admissible. I hold the statutory declaration of Goh Ching irrelevant and inadmissible.

We now come to the two memoranda of transfer executed on 15 March 1924. The plaintiff says that going by Teow Kee's birth date shown on his tombstone - shown as 1 July 1912 - Lee Teow Kee on the date of execution of the memoranda was only 12 years old, a minor. The transfer could not have been made to a minor. Ergo the transfer must have been made to the plaintiff's father, Lee Chan and it was made in his father's other name, Lee Aik.

I shall advert to this aspect of the evidence after I have examined the evidence adduced by the defendant that his father was known as "Lee Aik".The defendant testified that his father was known as Lee Teow Kee alias Lee Aik. And I have no reason to disbelieve him.

He said his father died in an accident on 29 September 1952 and that he applied for letters of administration in respect of the father's estate. He included the land under dispute as among his father's assets. He found the title to the disputed land in his father's house.

He testified under cross-examination that he saw a tombstone on his father's grave for the first time in 1980 and before that there had been only a wooden plaque at the grave; he said the tombstone could have been erected by his step mother who left the family 3 years after his father had passed away. There is no reason to disbelieve this aspect of his evidence. Although the inscription on the tombstone does not contain any reference to "Lee Aik" as an alias of the deceased father of the defendant, I do not think one can read more into it that therefore Teow Kee did not have the alias of Lee Aik.

These were several documents DBD1, DBD11, DBD15 which were agreed documents and which both parties freely referred to. The citizenship certificate of Lee Teow Kee (DBD1) shows that he had an alias of "Lee Yik." Counsel for the plaintiff characterises this entry as inconclusive. But it will be remembered that the plaintiff in his pleading does not allege fraud on the part of Lee Teow Kee in respect of the disputed property. Why then would Lee Teow Kee have claimed an alias of Lee Aik in the citizenship certificate? Why too would he state his alias as "Lee Aik" in his application to the Registrar of Business in 1940 (DBD11) for the registration of particulars in respect of "Seng Aik Sawmill, Mentakab" if that was not his alias. At the second page of the application the alias "Lee Aik" is given and Lee Teow Kee confirmed the accuracy of the statements made in the form in the name of "Lee Teow Kee alias Lee Yik". Previous to this application on 15 August 1940 he had also made an application (DBD15) to register particulars in respect of "Lee Chan Estate" and there too he gave his alias as "Lee Yik" and verified the statements in the form in the name of "Lee Teow Kee alias Lee Yik". I have no doubt that Lee Teow Kee was also known as "Lee Yik."

But was Lee Teow Kee known as "Lee Yik" or "Lee Yeak" in 1924 when Goh Ching transferred the property to "Lee Yeak"? The plaintiff points out that the tombstone of Lee Teow Kee shows that he was born in 1912 and that therefore he was 12 in 1924. I have however my reservations on the worth of that inscription as it is not clear who put the

inscription there; the defendant had said it could have been his step-mother who put up the tombstone and that he only saw the tombstone there in 1980 and before that there was only a plaque at the grave. On the other hand in both the forms filed by Lee Teow Kee with the Registrar of Business in 1940, previously referred above (DBD11 and DBD15), Lee Teow Kee had put down his age then as 35 meaning he was born in 1905; in which case he was 19 in 1924.

Although before the coming into force of the Age of Majority Enactment (Cap. 68) in the Federated Malay States on 1 January 1933 there was no written law in regard to the age of majority in the FMS it was held in 1919 by the Supreme Court of the FMS in *Yap Tham Thai v. Low Hup Neo* 1 FMSLR 383 at 402, that the age of majority, except for the purpose of the Probate and Administration Enactment (which had a provision defining the meaning of "minor"), was 21. Going on this case the argument is that therefore, since Teow Kee was only 19 in 1924 he could not have been the transferee of the two lots of land which were the subject matter of the memoranda. That is of course on the assumption that the declaration of Teow Kew that he was 35 in 1940, although not conclusive in the absence of his birth certificate or other cogent evidence on the matter, may amount to some evidence that he was a minor in 1924. However I am not prepared to go so far as to say that the transfer was not made to him even assuming he was a minor. To say that the transfer could not be made to him is quite different from saying that if there was a transfer the transfer was invalid because it was to a minor. It will be noted that in the memorandum of transfer executed under the FMS Land Enactment (see e.g. PBD20 and 22) there was no requirement for the witness attesting the signature of the transferor or transferee to attest that the person executing the memorandum had acknowledged to him that he was of full age unlike what is required under s. 211 read with Form 13B of the National Land Code. In the circumstances I am not prepared to accept as a fact that the transfer could not have been made to Lee Teow Kee as "Lee Yeak" although he could have been a minor. I am also not prepared to accept that it was in fact transferred to Lee Chan as there is no evidence that he was known as "Lee Aik" or "Lee Yeak"; as I had stated earlier, while Lee Chan was known as "Lee Chin Aik" there is no evidence that he had an alias of "Lee Aik" or "Lee Yeak" nor is there any evidence that, except for the self-serving evidence of the plaintiff, that "Lee Aik" or "Lee Yeak" is a contraction of the name "Lee Chin Aik". Added to all these is the unexplained and surely strange behaviour of Goh Ching, the transferor of the two lots of land, if indeed she transferred the properties to her husband and not to her son. She co-administered the estate of her deceased husband, Lee Chan, and yet nowhere in the lists of assets was the disputed property mentioned nor did she do anything to indicate that the property was wrongly excluded from Lee Chan's estate. Considering all the evidence before me I cannot say that on a balance of probabilities that the plaintiff has shown that the disputed property belonged to his father.

I do have to note in this judgment that the plaintiff was asked to compare the handwriting of the signatures in Chinese characters appearing in the memoranda of transfer relating to the land in dispute, as to whether they were Lee Chan's or Lee Teow Kee's handwriting, with the handwriting of signatures admitted to be those of Lee Chan and Lee Teow Kee in other documents. Since there is no evidence that the plaintiff was acquainted with the handwriting of either Lee Chan or Lee Teow Kee, his views are not relevant having regard to s. 47 of the Evidence Act. However. s. 73(1) of the Evidence Act provides for the comparison of a signature purporting to be written by a person with others admitted or proved to the satisfaction of the Court. The comparison can be made by a witness or by a Court.

To my mind however the views of the plaintiff who made the comparison are on his own admission inconclusive and I disregard them. I myself cannot make a direct comparison of the signatures being quite unfamiliar with the Chinese script. I would have thought a handwriting expert should have been called to assist the Court on the matter under s. 45 of the Act.

One other matter before passing on to the allegation of fraud. The defendant was asked several questions concerning Chinese usages relating to the inscription of family and generation names on tombstones but no evidence was adduced to show that the defendant had special means of knowledge on the matter and consequently I reject the evidence as to these usages as not being relevant bearing in mind s. 49 of the Evidence Act 1950.

Fraud

Fraud is pleaded. But what is the nature of the fraud? The plaintiff avers that his father was known as "Lee Yeak" or "Lee Aik". And that when the defendant applied in 1953 for letters of administration in respect of his father's estate he stated in his Petition that his father, Lee Teow Kee, was also known as "Lee Yeak" or "Lee Aik". And the defendant included the disputed land, which was registered in the name of "Lee Yeak", in the list of assets of the estate of Lee Teow Kee. And that apparently constitutes fraud.

Order 18 r. 12 RHC, governs the pleadings in this case although the pleadings were filed under the old RSC 1957 (see O. 1, r. 2(1)) and the rule is that particulars have to be given of the fraud pleaded. In this case however there is merely a general allegation of fraud and the pleadings stand mute as to the circumstances relied upon as constituting the alleged fraud. A general allegation of fraud is insufficient even to amount to an averment of fraud of which any Court ought to take notice: *Wallinford v. Mutual Society* [1880] 5 App. Cas.

In this case it is not even pleaded at the barest minimum nor are there any particulars showing that the defendant knew that the plaintiff's father was known as Lee Aik and that defendant's father was not known as Lee Aik and that the defendant was aware he was not. Or that the defendant knew the property belonged to his grandfather so that at least an inference could be drawn that he fraudulently or dishonestly included the disputed property in the assets of his own father's estate. This lack of inclusion of the circumstances constituting the alleged fraud makes it difficult for the Court to see what the issues are or to sift the evidence and to decide what the plaintiff wants the Court to conclude. In fact in regard to the evidence, the defendant was not even cross-examined as to whether he knew the land did not belong to the defendant's father. The Court was merely landed with the assertion that the plaintiff's father was known as "Lee Aik" and since the property was transferred to Lee Aik in 1924 therefore the property was not the property of the defendant's father. When asked as to how the defendant was to know the alias of Lee Chan the plaintiff replied to this question by his Counsel that he did not know. The plaintiff implied in his evidence that the defendant's father could not have been known as "Lee Yeak" but he was not categorical that he did not have the alias. Thus not only was there an absence in the particularity of the circumstances in the pleadings constituting fraud, there was a general vagueness in the evidence relating to the fraud which allegedly took place. And the law is that he who alleges fraud must clearly and distinctly prove it.

I would like to touch on another aspect of the evidence. The plaintiff gave evidence that he had negotiations with the defendant in Singapore in 1977 over land matters. This the defendant did not deny. The plaintiff said, "At that time I realised my father Lee Aik has (*sic*) become the defendant's father". The defendant however stated that the discussion was on other land matters. Under cross-examination the plaintiff confirmed that it was in 1977

that he had first heard about it. Under further cross-examination he however back-tracked and said he did know about the dispute as early as 1973 but he did not have documentary evidence like the petition relating to Lee Chan's estate then. But in 1973, on his admission (although para. 11 of the statement of claim gives the impression that he returned to Malaysia only in 1979), he was in Malaysia and had heard about the dispute over the land. When confronted with a letter that he had written to the defendant in 1973 (DIT) he "roughly agreed" he said, that he had already knowledge of the dispute. But the plaintiff distinctly states in the letter to the defendant. "You use unethical ways and means of passing of "Lee Aik" as "Lee Teow Kee" and transfer the whole sawmill". But this sentence was in reference to several properties belonging to Lee Chan and allegedly not distributed to the rightful beneficiaries.

My distinct impression is the plaintiff genuinely felt there had been fraud practised by the defendant and he wanted to tailor his evidence to suit his case. My other distinct impression is that there was a genuine dispute between the plaintiff and the defendant over several lots of land which included the subject matter of this suit. It may well have been that some properties of Lee Chan have not been distributed to all the rightful beneficiaries. But that is not in issue before me - that is a different matter altogether from the present dispute in this case. The Court cannot act on conjectures.

It is settled law that a higher standard of proof is required where fraud is alleged than that required for proving ordinary matters in a civil action. (See *Bater v. Bater* [1951] p. 35; *Netherlands Trading Society v. Koh Kim Guan* [1959] MLJ 173). I can see no proof at all, let alone a higher standard of proof, in this case where fraud has been alleged.

In view of my finding that no fraud has been proved in this case and that there is no proof that the disputed land belonged to Lee Chan, the plaintiff's father, it is not necessary for me to go into the issue of limitation or any of the other matters in the pleadings. I accordingly dismiss the plaintiff's claim with costs.

Also found at [1988] 1 CLJ 619